(4)

No. 04-661

Supreme Court, U.S.
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In The
Supreme Court of the United States

BONNIE J. KORESKO and
JOHN J. KORESKO, V,

Petitioners,

v.

MARK FARLEY, SEATON ROSS, L.P.,
TOWNSHIP OF TREDYFFRIN, BRYN MAWR
CUSTOM HOME, INC., and OLLIE BOWER,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENTS MARK FARLEY, SEATON ROSS, L.P., AND BRYN MAWR CUSTOM HOME, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Mark Farley, Seaton Ross, L.P., and Bryn Mawr Custom Home, Inc., state the following:

Respondent Seaton Ross, L.P., is a registered Pennsylvania limited partnership. The general partner of Respondent Seaton Ross, L.P., is Respondent Bryn Mawr Custom Home, Inc.

Respondent Bryn Mawr Custom Home, Inc., is a registered Pennsylvania corporation. Respondent Bryn Mawr Custom Home, Inc., has no parent corporation(s) nor does any publicly held company(ies) own ten percent (10%) or more of the stock of Respondent Bryn Mawr Custom Home, Inc.

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INTRODUCTION AND REASONS FOR DENYING THE WRIT

Respondents, Mark Farley ("Farley"), Seaton Ross, L.P. ("Seaton Ross"), and Bryn Mawr Custom Home, Inc. ("BMCH") (collectively, the "Farley Respondents"), hereby file, pursuant to Supreme Court Rule 15, this brief in opposition to the petition for a writ of certiorari filed by Petitioners, Bonnie J. Koresko and John J. Koresko, V, Esquire (collectively, the "Koreskos" and/or "Petitioners"). In their petition for a writ of certiorari ("Petition for Writ"), the Koreskos ask this Supreme Honorable Court to review the August 9, 2004, decision of the Supreme Court of Pennsylvania which denied the Koreskos' petitions for allowance of appeal to that Honorable Court.

This case involves matters of Pennsylvania property rights.[1] In the courts below, the Koreskos unsuccessfully sought to change longstanding Pennsylvania real property law and precedent. The Koreskos asked the Pennsylvania courts to create and/or find a property right(s) in and/or for the subterranean tree roots of trees allegedly owned by the Koreskos and which bordered and/or were in close proximity to an adjacent parcel of land being developed by Seaton Ross and BMCH. The Koreskos also contended, among other things, that they were denied due process as a result of the failure to notify them of the approval of the subdivision plan for the parcel of land adjoining/adjacent to the Koreskos' property, which parcel was being developed by Seaton Ross and BMCH.

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[1] For background, the instant matter is one (1) of five (5) separate cases filed by Petitioner John J. Koresko, V, Esquire, against Respondent Mark Farley, Mr. Farley's relatives, and Mr. Farley's business entities. The cases evolve out of a prior acrimonious attorney-client relationship between, among others, Petitioner John J. Koresko, V, Esquire, and Respondent Mark Farley. All of the five (5) aforementioned matters were filed after Mr. Koresko had learned that Mr. Farley had purchased and/or was developing a parcel of land adjacent to Petitioners' home.

The Koreskos' claims of the denial of their property rights and of due process were struck down by the learned trial court, the Commonwealth Court of Pennsylvania, and the Supreme Court of Pennsylvania. The learned trial court, finding that no right(s) existed under Pennsylvania law with regard to encroaching tree roots, and that the Pennsylvania Municipalities Planning Code provided the exclusive method to challenge the subdivision approval, granted the various motions for judgment/partial judgment on the pleadings filed by the named defendants in this case, including the Farley Respondents, and denied the Koreskos' motion for summary judgment. The Koreskos then voluntarily discontinued their remaining claim(s). On direct appeal, the Commonwealth Court of Pennsylvania upheld and affirmed the findings of the learned trial court. The Koreskos then each filed petitions for allowance of appeal to the Supreme Court of Pennsylvania which denied discretionary review. The Koreskos now ask this Supreme Honorable Court to review this matter based on perceived due process violations, allegedly unconstitutional local subdivision ordinances, and a perceived need for a uniform and national law regarding encroaching tree roots.

As will be more fully discussed *infra*, the Koreskos' Petition for Writ must be denied. This case involves matters of state real property law and does not involve any question(s) of federal law or fundamental rights. The Koreskos were afforded due process but failed to avail themselves of the mandatory and exclusive state law procedures. Moreover, the Koreskos have failed to set forth compelling reasons for granting the Petition for Writ and have failed to set forth any of the character of reasons, as enumerated in Supreme Court Rule 10(a) through 10(c), that this Supreme Honorable Court considers in determining whether to grant certiorari. Notably, the Koreskos' Petition for Writ also contains misstatements of fact and law, as discussed *infra*, that bear on the issues that may be properly before this Supreme Honorable Court if certiorari were granted.

COUNTERSTATEMENT OF THE CASE

A. Pertinent Procedural Background

The procedural history of this case is tortured and extensive; however, consideration of the following pertinent procedural history is necessary to the consideration of the instant Petition for Writ.

On June 25, 2001, the Koreskos initiated this action against the Farley Respondents (Farley, Seaton Ross, and BMCH), Ollie Bower ("Bower"), the prior owner of the property at issue, and the Township of Tredyffrin ("Tredyffrin Township"), the township where the property at issue is situated, by filing a Complaint in Equity (the "Original Complaint"). The Original Complaint listed various, inexplicit causes of action[2] against all of the named defendants regarding the sale and development of real property located at 1175-1185 Seaton Ross Road, Tredyffrin Township, Chester County, Pennsylvania (the "Property").

On March 6, 2002, with court permission, the Koreskos filed an amended complaint (the "Amended Complaint"). The Amended Complaint added and named Stephen D. Kaye and Diana S. Kaye (collectively, the "Kayes") and Robert W. Grupp and Jan M. Grupp (collectively, the "Grupps")[3] as defendants in this matter (in addition to those defendants named in the Original Complaint). The Amended Complaint also contained six (6) inexplicit causes of action against all of the named defendants regarding the sale and development of the Property.

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[2] The Pennsylvania Rules of Civil Procedure relating to pleading practice require fact pleading.

[3] At the time of the filing of the Amended Complaint, the Kayes and the Grupps were the respective owners of the two (2) parcels that now comprise the Property. The Koreskos' property, located at 1159 Seaton Ross Road, Tredyffrin Township, Chester County, Pennsylvania (the "Koreskos' Property"), shares a common boundary with 1175 Seaton Ross Road, the property owned by the Grupps at the time of the filing of the Amended Complaint. The Kayes owned 1185 Seaton Ross Road. Of note, in their instant Petition for Writ, the Koreskos have not named either the Grupps or the Kayes as respondents.

On August 2, 2002, after the pleadings were closed, the Grupps and the Kayes filed a joint motion for judgment on the pleadings.[4] On August 6, 2002, Farley and Seaton Ross filed a motion for partial judgment on the pleadings. On August 23, 2002, BMCH filed a motion for partial judgment on the pleadings. The Koreskos filed responses to each of the respective motions for judgment/partial judgment on the pleadings.[5]

On or about August 23, 2002, the Koreskos filed a motion to disqualify the law firm of Lamb, Windle & McErlane, P.C., as counsel for Tredyffrin Township, along with supporting documents. Tredyffrin Township filed a response to the motion to disqualify on September 6, 2002.

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[4] In Pennsylvania, pursuant to then applicable Pennsylvania Rule of Civil Procedure number ("Pa.R.C.P. No.") 1034(a), "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." *See* Pa.R.C.P. No. 1034. In considering a motion for judgment on the pleadings, the Pennsylvania trial courts consider the following: in reviewing a request for judgment on the pleadings, the court must confine its consideration to the pleadings filed and accept as true all well-pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed, considering only those facts which were specifically admitted. *Gambler v. Huyett,* 679 A.2d 831, 834 (Pa. Super. 1996). Judgment on the pleadings is proper if the moving party's right to succeed is certain and the case is so free from doubt that trial would be fruitless. *Swift v. Milner,* 538 A.2d 28, 31 (Pa. Super. 1988).

[5] The Koreskos did not include in the Appendix to their Petition for Writ any of the motions for judgment/partial judgment on the pleadings, or their responses thereto, filed in this case and which are the subject of the instant matter. Notwithstanding, in the Farley Respondents' respective motions for partial judgment on the pleadings, the Farley Respondents did not seek judgment on the pleadings with respect to the Koreskos' claims for trespass as contained in Count III of the Amended Complaint. Those claims, the only claims remaining after the learned trial court granted the respective motions for judgment/partial judgment on the pleadings filed by the named defendants, were voluntarily discontinued by the Koreskos on February 12, 2003. *See infra,* at p. 7.

On September 16, 2002, Tredyffrin Township filed a motion for judgment on the pleadings. The Koreskos filed a response to Tredyffrin Township's motion for judgment on the pleadings on October 3, 2002.

On October 28, 2002, the learned trial judge, the Honorable Robert J. Shenkin, Court of Common Pleas of Chester County, Pennsylvania, sent counsel for all parties a letter ("October 28th Letter") which, among other things, scheduled oral argument on all motions outstanding in this case at that time including, but not limited to, the motions for judgment/partial judgment on the pleadings filed by the Farley Respondents, the Grupps, and the Kayes. The October 28th Letter also invited the Koreskos to file, if they desired and if such filing would cure the deficiencies of the Amended Complaint, a further amended complaint. The Koreskos **did not** avail themselves of the trial court's offer and did not file a further amended complaint in this case nor formally seek leave to do so.

On December 4, 2002, following extensive oral argument (held on two (2) different occasions), the learned trial judge entered an order (the "December 4th Order") which, among other things: (1) granted the motion for judgment on the pleadings filed by the Grupps and the Kayes and entered judgment in favor of the Grupps and the Kayes and against the Koreskos in no amount; (2) granted the motions for partial judgment on the pleadings filed by the Farley Respondents and entered judgment in favor of the Farley Respondents and against the Koreskos in no amount on Counts I, II, IV, V, and VI of the Amended Complaint; (3) granted the motion for judgment on the pleadings filed by Tredyffrin Township and entered judgment in favor of Tredyffrin Township and against the Koreskos in no amount; and (4) denied, as moot, the Koreskos' motion to disqualify the law firm of Lamb, Windle & McErlane, P.C., as counsel for Tredyffrin Township.

In footnotes to the December 4th Order, as is practice in the Court of Common Pleas of Chester County, Pennsylvania, the learned trial judge stated, among other things, that

> We are satisfied that Pennsylvania does not and will not recognize an easement for tree roots and overhanging branches.
>
> * * *
>
> . . . the exclusive method for challenging approval of a subdivision is pursuant to the procedures set forth in the Municipalities Planning Code [Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202].
>
> * * *
>
> . . . in the absence of an easement, the pleadings [i.e., essentially, the Amended Complaint] fail to state any cause of action based upon the subdivision approval.

See Petitioners' Appendix ("Appendix") to their Petition for Writ, at Vol. 1, December 4th Order, n.1 and 2, pp. 109a-114a.

On November 15, 2002, the Koreskos filed a motion for partial summary judgment.[6] On December 12, 2002,

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[6] Pursuant to then applicable Pa.R.C.P. No. 1035.2,

> [a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2. A grant of summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions of record, and affidavits on file support the lower court's conclusion that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Nationwide Mutual Insurance Company v. Nixon*, 682 A.2d 1310, 1313 (Pa. Super. 1996). The court must ignore

(Continued on following page)

the Farley Respondents filed their collective response to the Koreskos' motion for partial summary judgment. By order dated December 18, 2002, and time-stamped December 19, 2002 ("December 18th Order"), the learned trial court denied the Koreskos' motion for partial summary judgment and directed the Chester County Court Administrator to list this case for trial as soon as possible.

On February 12, 2003, the Koreskos voluntarily filed a praecipe to discontinue as to the claims asserted in Count III (trespass) of their Amended Complaint, being the only claims then remaining in this matter against the Farley Respondents.

On March 25, 2003, Bower filed a motion for judgment on the pleadings. On March 26, 2003, the Koreskos filed their response to Bower's motion for judgment on the pleadings. By order dated March 27, 2003 ("March 27th Order"), the learned trial court granted Bower's motion for judgment on the pleadings and entered judgment in favor of Bower and against the Koreskos in no amount.

On April 25, 2003, the Koreskos filed a notice of appeal from the learned trial court's December 4th Order, December 18th Order, and March 27th Order.

On March 10, 2004, the Commonwealth Court of Pennsylvania filed its opinion and order (collectively "Commonwealth Court Opinion") in connection with the Koreskos' appeal whereby it affirmed the learned trial court's decisions. In so doing, the Commonwealth Court of Pennsylvania declined to recognize the existence of an

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controverted facts contained in the pleadings and restrict its review to the material filed in support of and in opposition to a motion for summary judgment and to those allegations in the pleadings that are uncontroverted. *Id.* Summary judgment should not be entered unless the case is clear and free from doubt. *Id.* Oral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact. *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932) (called the "Nanty-Glo Rule").

easement by prescription for tree parts. *See* Appendix, at Vol. 1, Commonwealth Court Opinion, pp. 30a-32a. The Commonwealth Court of Pennsylvania further held that the Koreskos' challenges to the validity of the subdivision and development plan for the Property were exclusively through the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as* amended, 53 P.S. §§ 10101-11202 ("MPC"). The Commonwealth Court of Pennsylvania also held that the Koreskos had no standing to assert an equity action regarding the removal of trees alleged to have been shown on the approved subdivision plan because they pled no individualized harm occasioned by the alleged removal of such trees. *See* Appendix, at Vol. 1, Commonwealth Court Opinion, pp. 34a-39a. Finally, the Commonwealth Court of Pennsylvania held, among other things, that the Koreskos' claim to enjoin a setback violation was moot. *See* Appendix, at Vol. 1, Commonwealth Court Opinion, pp. 39a-41a.

After the Commonwealth Court of Pennsylvania issued its opinion in this case, the Koreskos filed petitions for allowance of appeal to the Supreme Court of Pennsylvania. By order dated August 9, 2004, the Supreme Court of Pennsylvania denied the Koreskos' respective petitions for allowance of appeal. *See* Appendix, at Vol. 1, pp. 1a-2a.

On November 8, 2004, the Koreskos filed the instant Petition for Writ with the Clerk of this Supreme Honorable Court.

B. Pertinent Factual Background

In December of 1999, Bower filed a subdivision plan with Tredyffrin Township to subdivide the Property into two (2) parcels. The Tredyffrin Township Board of Supervisors approved the subdivision plan ("Subdivision Plan") in February of 2000. Following the approval, Bower signed the approved Subdivision Plan and caused it to be recorded in

the Office of the Recorder of Deeds of Chester County, Pennsylvania.[7]

The Koreskos' Property shares a common boundary with a portion of the Property, being 1175 Seaton Ross Road (Lot 2 on the Subdivision Plan). In the Amended Complaint, the Koreskos alleged that, prior to subdivision, "several mature[8] trees existed" along the common boundary between the Koreskos' Property and what was then known as the Grupps' property (1175 Seaton Ross Road), and that improvements to the Property, being done by the Farley Respondents, had done harm to the root systems of the trees along the common boundary. *See* Appendix, at Vol. 1, Amended Complaint, ¶ 20, pp. 176a-177a. In their Amended Complaint, the Koreskos argued that they had acquired an "easement" against the Property with respect

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[7] The Subdivision Plan was recorded on March 23, 2000, in the Office of the Recorder of Deeds of Chester County, Pennsylvania, as Plan No. 15312. At one of the arguments in this case on the subject motions, the learned trial court took judicial notice of the recorded Subdivision Plan, which is expressly referred to in the Amended Complaint, without objection by the Koreskos. The Subdivision Plan was part of the reproduced record before the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania.

[8] Although in the Koreskos' Petition for Writ they claim the trees allegedly injured are "ancient," in their Amended Complaint, the Koreskos never referred to the trees as ancient, but only as "mature." Moreover, said trees are not of ancient origin. While the real age of said trees has not been conclusively established, the subject trees are not of, nor did the Koreskos in the trial court contend that the subject trees are of, historical or ancient importance or significance but are only common, (apparently) fully grown trees existing on a residential lot. Usually, in order for a tree or trees to be considered "ancient," which is a term of art, the particular tree or trees must be old for its/their particular species. *See* David Yarrow, *Defining Old Growth*, The Earth Restoration and Reforestation Alliance (June 2002). A numerical value for being qualified as ancient varies with each tree species. *Id.* A pitch pine is old at 90 years, while a hemlock or oak reaches maturity only at 150 years and commonly lives for four (4) or five (5) centuries. *Id.* The Koreskos' instant claims that the subject trees are allegedly "ancient" is therefore a misstatement of fact and an issue which was not presented in the trial court.

to the root systems of their trees and that said "easement" was to have been displayed on the Subdivision Plan. *See* Appendix, at Vol. 1, Amended Complaint, at ¶¶ 67, 72, and 74, pp. 183a-184a. Of note, at no time in the trial court did the Koreskos claim a license, permanent or otherwise, or anything other than an "easement."

The Koreskos allege they sent a letter to Tredyffrin Township, on June 6, 2000, "protesting the subdivision and building permits." However, the Koreskos never filed an appeal from the decision of the Tredyffrin Township Board of Supervisors with respect to the approval of the subdivision, as is required by the MPC, 53 P.S. §§ 10101-11202.[9]

The Grupps closed on 1175 Seaton Ross Road (Lot 2 on the Subdivision Plan) on June 26, 2001. The Kayes closed on 1185 Seaton Ross Road (Lot 1 on the Subdivision Plan) on June 29, 2001.

ARGUMENT

Preliminarily, it is important to note that the Amended Complaint filed by the Koreskos in this case contained six (6) separate, inexplicit, and unlabeled counts, purportedly against all named defendants.[10] In the Amended Complaint, the Koreskos did not name any type or cause(s) of action, including any federally recognized claim under 42 U.S.C. § 1983, nor did the Koreskos allege

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[9] As noted *supra*, the Pennsylvania Rules of Civil Procedure relating to pleading practice require fact pleading. In response to allegations raised by the Farley Respondents, in their new matter to the Amended Complaint, that the Koreskos did not appeal the granting of the subdivision approval, the Koreskos did not specifically deny, as required by Pa.R.C.P. No. 1029(a), the factual allegations asserted by the Farley Respondents regarding the same. Therefore, pursuant to Pa.R.C.P. No. 1029(b), the Koreskos are deemed to have admitted the fact(s) that they did not file an appeal of the grant of subdivision approval for the Property within the thirty (30) day period required by the MPC.

[10] The Original Complaint also listed six (6) inexplicit, unlabeled counts against all the named defendants [with the exception of the Grupps and the Kayes who were added as parties with the filing of the Amended Complaint].

which count(s) were asserted against which named defendant(s). Further, the Amended Complaint only contains one (1) *ad dannum* clause setting forth the relief requested by the Koreskos and it appears on the very last page of the Amended Complaint. Notwithstanding, at all times material to this matter, the Farley Respondents, the Grupps, and the Kayes characterized the Amended Complaint as setting forth claims for: a prescriptive easement and/or easement by implication over the Property[11]; a defective subdivision of the Property; trespass; civil conspiracy; and some unidentified form of equitable and/or injunctive relief. At no time material to this matter did the Koreskos object to the aforementioned characterizations of the Koreskos' claims in the Amended Complaint by the Farley Respondents, the Grupps, and/or the Kayes nor to the trial court's acceptance of those characterizations.

I. The Koreskos have failed to set forth in their Petition for Writ the considerations governing review on certiorari as required by Supreme Court Rule 10.

As this Supreme Honorable Court is certainly aware, and although neither controlling nor fully measuring this

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[11] In their Petition for Writ, the Koreskos argue that they have a cognizable property right in the form of a permanent license. The learned trial court was never asked to review the potential applicability of any doctrine of license to the allegations of this case. The first, and only, time that the Koreskos raised the issue of an alleged "license" was in the petition for allowance of appeal filed by Bonnie Koresko with the Supreme Court of Pennsylvania. There, Mrs. Koresko, for the very first time in this matter, claimed to hold an "irrevocable license" with respect to the Property. Of note, in the Amended Complaint, the phrase "irrevocable license" does not appear anywhere. Because the claim of an "irrevocable license" was not raised before the learned trial court, nor the intermediate appellate court, the Supreme Court of Pennsylvania correctly decided not to entertain the issue because it had not been properly presented nor preserved. Since the issue of an alleged "license" under applicable state law was not properly raised in the state courts, this Supreme Honorable Court should not consider it here.

Supreme Honorable Court's discretion, the character of reasons to be considered in reviewing a petition for writ of certiorari are as follows:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

See Supreme Court Rule 10(a)-(c).

Here, the Koreskos do not set forth any of the reasons, as articulated in Supreme Court Rule 10(a)-(c), to support a grant of their Petition for Writ. This matter does not involve a decision of a United States court of appeals. This matter does not involve the Supreme Court of Pennsylvania deciding an important question of federal law in conflict with any decision of another state court of last resort or of a United States court of appeals. This matter does not involve a state court or a United States court of appeals deciding an important question of federal law that has not been, or that should be, settled by this Supreme Honorable Court. This matter also does not involve a decision regarding an important federal question which

conflicts with relevant decisions of this Supreme Honorable Court.

Rather, this matter involves the interpretation and application of uniquely state laws and state property rights, nothing more and nothing less. Although the Koreskos attempt to persuade this Supreme Honorable Court that this matter involves the denial of due process, because no federally protected right is at issue and because no state property right(s) exists, there can be no denial of due process, either substantively or procedurally.

II. The Koreskos cannot establish a due process violation.

The primary question(s) that the Koreskos ask this Supreme Honorable Court to consider is whether the lower courts erred by failing to address the Koreskos' claims under 42 U.S.C. § 1983 for a violation of the Koreskos' due process rights in violation of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment to the United States Constitution provides in part that "[n]o state . . . shall . . . deprive any person of life, liberty, or property, without due process of law." *See* U.S. CONST. amend. XIV. This provision of the United States Constitution has been interpreted as having both substantive and procedural components. *See Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846-847 (1992); *Keim v. County of Bucks*, 275 F. Supp.2d 628 (E.D. Pa. 2003).

The Civil Rights Act provides for civil redress by plaintiffs alleged to be injured by persons or entities acting under color of state law in violation of the United States Constitution or laws of the United States. 42 U.S.C. § 1983. To prevail on a § 1983 claim, a plaintiff must prove that: (1) the defendants acted under color of state law; (2) depriving the plaintiff of a right secured by federal law; and (3) damages. *See Sameric Corp. of Delaware, Inc., v. City of Philadelphia,* 142 F.3d 582, 590 (3d Cir. 1998); *Kelly v. Borough of Sayreville, N.J.,* 107 F.3d 1073, 1077 (3d Cir. 1997); *Mark v. Borough of Hatboro*, 51 F.3d 1137,

1141 (3d Cir. 1995). In their Petition for Writ, the Koreskos contend that the right of which they were deprived was the right to due process of law under the Fourteenth Amendment to the United States Constitution. Although in their Petition for Writ, at p. 4 thereof, the Koreskos contend that they sought to "protect both substantive and procedural rights in the protection of their property interest," as is addressed within, the Koreskos fail to set forth any cognizable federal or state law right so as to state a claim under 42 U.S.C. § 1983.[12] Of note, in their Petition for Writ, the Koreskos confuse and intertwine their substantive and procedural due process claims. Because meaningful discussion requires that these different components of due process be addressed separately, the Farley Respondents address each component seriatim.

A. Substantive Due Process

As a threshold matter, to maintain a cause of action under either a substantive or procedural due process theory, a plaintiff must establish that he has a protected property interest to which the Fourteenth Amendment's due process protection applies. *See Gikas v. Washington School District*, 328 F.3d 731, 735 (3d Cir. 2003). However, there is a clear distinction between the protection afforded to property interests which arise under state law and those which arise under the United States Constitution. As a result, property interests protected by procedural due process are not necessarily protected by substantive due process. *Id.*

To state a substantive due process claim, a plaintiff must have been deprived of a "particular quality of property

[12] Although at p. 4 of their Petition for Writ, the Koreskos contend that "[i]n the courts below Petitioners advanced a properly plead action under 42 U.S.C. §§ 1983, [sic] and 1985," the Koreskos' Petition for Writ is devoid of any argument or discussion of their alleged Section 1985 claim. Consequently, any issue with regard to any alleged Section 1985 claim that the Koreskos may have raised in the courts below has been abandoned and is not properly before this Supreme Honorable Court for review or consideration.

interest," not just one which is determined by reference to state law but one which is "fundamental" under the United States Constitution. *See Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139-140 (3d Cir. 2000). Whether a certain property interest embodies the required particular quality depends on whether that interest is fundamental under the United States Constitution. *Id.*

In their Petition for Writ, the Koreskos do not cite to any authority for the proposition that an alleged easement falls within the narrow definition of a fundamental property interest. Moreover, the finding of the existence of an easement over the Property is a wholly state law created property right and bears little resemblance to other rights and property interests deemed fundamental under the United States Constitution. "In cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest . . . the plaintiff has not stated a substantive due process claim." *Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 958 (7th Cir. 1988). Notably, the United States Constitution protects a private property owner's right to *exclude* others from private property. *See Kaiser Aetna v. U.S.*, 444 U.S. 164, 179-180 (1979). Because this matter does not involve a fundamental property interest, the Koreskos do not, and cannot, state a substantive due process claim under 42 U.S.C. § 1983.

B. Procedural Due Process

As with a substantive due process claim, a § 1983 claim for violation of procedural due process rights requires that a plaintiff prove that he was deprived of a property interest under color of state law without due process. *See Dykes v. Southeastern Pennsylvania Transportation Authority*, 68 F.3d 1564, 1570 (3d Cir. 1995), *cert. den.*, 517 U.S. 1142 (1996). To establish a cause of action for a violation of procedural due process, a plaintiff must prove that a person acting under color of state law deprived him of a protected interest and that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. *See Midnight*

Sessions, Ltd., v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991), *cert. den.*, 503 U.S. 984 (1992). In the context of procedural due process claims, the threshold inquiry is whether the complainant has been deprived of property. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985) (*citing Board of Regents of State Colleges v. Roth*, 408 U.S. at 577); *Paul v. Davis*, 424 U.S. 693, 708-709 (1976), *reh'g den.*, 425 U.S. 985 (1976). If such property interest is deprived, due process requires notice and a meaningful opportunity to be heard. *Midnight Sessions, Ltd.*, 945 F.2d at 680.

Further, where the plaintiff alleges that the deprivation of his property was unauthorized by state law, the state need not provide predeprivation process but instead need only provide a postdeprivation remedy. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Hudson v. Palmer*, 468 U.S. 517 (1984). This analysis applies to deprivations of liberty as well as property. *Zinermon*, 494 U.S. at 132. The plaintiff must plead the inadequacy of state process to state a claim for violation of procedural due process rights. *National Communication Systems v. Michigan Public Service Commission*, 789 F.2d 370 (6th Cir. 1986), *cert. den.*, 479 U.S. 852 (1986).

Because the due process clause requires, in the first instance, the existence of a cognizable right under state law, and because no right(s) exist here, as discussed *infra.*, the Koreskos' Petition for Writ should be denied.

1. The Koreskos cannot establish a property right under Pennsylvania law because Pennsylvania law does not recognize an easement and/or easement rights for tree roots.

Instantly, the Commonwealth Court of Pennsylvania in affirming the learned trial court, held that, as a matter of law, easement rights for encroaching tree parts are not

recognized under Pennsylvania law.[13] The Commonwealth Court of Pennsylvania's decision in this case is entirely consistent with Pennsylvania law and sound public policy considerations.

Under Pennsylvania law, a party may obtain rights over the lands of another via a prescriptive easement or via an easement by implication. A prescriptive easement is created by adverse, open, continuous, notorious, and uninterrupted use of land for twenty-one (21) years. *See Martin v. Sun Pipe Line Co.*, 542 Pa. 281, 666 A.2d 637, 640 (1995). A party asserting a prescriptive easement must demonstrate each element of such easement by proof that is *clear and positive*. *See Burkett v. Smyder*, 535 A.2d 671 (Pa. Super. 1988) (emphasis added).

In order to establish the existence of an easement by implication, it is necessary to show that the use was *actually known* to the purchaser of the servient tenement, or was so open and notorious as to put him on notice of the probable existence of the easement. *See Fidelity-Philadelphia Trust Co., v. Wengert*, 67 Pa. D. & C. 351 (1947) (emphasis added).

However, invading tree roots constitute a nuisance which is akin to branches that overlay on a neighboring property. *See Keiper v. Yenser*, 42 Pa. D. & C.2d 1 (Carbon Co. 1966). In Pennsylvania, a landowner may always cut away to his property line branches and roots from trees of the adjoining owner; a showing that the encroaching tree limbs, branches, or roots have caused sensible damage is not a precondition to a landowner's exercising a self-help remedy. *See Jones v. Wagner*, 624 A.2d 166 (Pa. Super.

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[13] In their Petition for Writ, the Koreskos repeatedly mention the theory and doctrine of "license." As noted *supra*, at footnote number 11, the Koreskos never raised the issue or doctrine of license, nor asked that the same be applied, in the trial court or in the Commonwealth Court of Pennsylvania. Therefore, any argument that the Koreskos present with regard to the issue of license has not been properly presented or preserved and should be disregarded by this Supreme Honorable Court.

1993), *app. den.*, 536 Pa. 626, 637 A.2d 286 (1993). Pennsylvania law affords a full panoply of remedies, including self-help, to a landowner whose property has been encroached by intruding and/or overhanging branches or tree limbs. *Id.*

Essentially, the Koreskos contend that the Pennsylvania courts erred in holding that Pennsylvania does and/or will not recognize a cause of action and/or easement(s) for tree roots and branches. *See* Appendix, at Vol. 1, Amended Complaint, ¶¶ 66, 67, and 68, p. 183a. In the trial court, the Koreskos stated that an easement for the "root systems" of their trees and other foliage exists over the Property pursuant to the theories of adverse possession and easements. *See* Appendix, at Vol. 1, Amended Complaint, at ¶¶ 66, 67, and 68, p. 183a. Of note, in their Amended Complaint, the Koreskos only contended that the roots of their trees, and not the branches thereof, have an alleged easement as to the Property. *See* Appendix, at Vol. 1, Amended Complaint, p. 172a-190a.

a. The Koreskos' easement claims are contrary to longstanding Pennsylvania law.

The Koreskos now seek to alter decades of precedent and Pennsylvania property rights law. Further, the Koreskos would have this Supreme Honorable Court overturn, throughout the nation, existing state laws on this issue and impose one general, blanket law on all states regarding the "rights" of tree roots throughout our country. In so doing, the Koreskos ask that this Supreme Honorable Court treat tree roots in suburban Pennsylvania the same as tree roots in the Sequoia National Forest in California. The Koreskos have not offered, nor did they offer in the Pennsylvania courts below, any good reason(s) for changing Pennsylvania law nor have the Koreskos proffered any compelling federal issue or question which requires action by this Supreme Honorable Court in this matter.

Property rights are unique to each state. In Pennsylvania, encroaching tree branches and tree roots are

considered trespassers, and, as such, they should not be accorded special treatment under the law.[14] The law in Pennsylvania is clear that a landowner can stop, and cut back to the property line, intruding branches and/or roots from entering upon his/her property from an adjoining landowner. *Jones,* 624 A.2d at 171. It is not necessary for the landowner to allege any actual injury or damage caused by the invading branches and/or roots. *Id.* There also is no need to allege harm in an action for trespass caused by the branches and/or roots of trees of another because the harm is not to the physical well being of the land, but to the *encroached upon landowner's right* to peaceably enjoy full and exclusive use of his property. *Id.* If one is only exercising his/her right to trim the branches and limbs of the encroaching trees, then they may *not* be held liable in damages for doing so. *Id.* (*citing Rosa v. Oliviera*, 342 A.2d 601 (R.I. 1975)) (damages not available for harm to encroaching shrubbery caused by party exercising common law right to self-help).

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[14] In the Pennsylvania courts below, and as contained in the Koreskos' petitions for allowance of appeal filed with the Pennsylvania Supreme Court, the Koreskos essentially contended that Pennsylvania law should recognize an easement for tree roots and branches under the "language" in *Jones v. Wagner, supra.* In *Jones*, the Superior Court of Pennsylvania, in *dicta* and in a footnote, stated that where there are encroaching tree branches, held openly, notoriously, hostilely, and continually for 21 years, and where actual harm is suffered to the tree owner's tree for the first time during the 22nd year, Pennsylvania law would not prohibit the finding of a prescriptive easement "in this situation." *Jones*, 624 A.2d at 171, n.3. Notwithstanding this nonprecedental statement, the Superior Court of Pennsylvania held in *Jones* that Pennsylvania law affords a "full panoply" of remedies to a landowner whose property is encroached by overhanging branches or tree limbs and that where one is "only exercising their right to trim branches and limbs of encroaching trees, they [the trimming party] *may not be held liable in damages for doing so.*" *Id.* Therefore, in *Jones*, the Superior Court of Pennsylvania reiterated longstanding Pennsylvania law that a landowner may trim encroaching branches [and so it follows, roots] over [or for that matter under] his property. The Koreskos even recognize this holding and that the reflections of the *Jones* court "were in dicta." *See* Petition for Writ, at p. 23.

To hold that the root systems of the Koreskos' trees and other foliage are entitled to an easement over the Property is contrary to longstanding Pennsylvania precedent. Further, to hold and impose one blanket national law regarding the "rights" of tree roots is absurd, draconian, and impractical. There is no basis or support for a national law on this issue, and Congress has not chosen to enter or act in this limited realm. A national law also would create uncertainty throughout the country regarding other apparently conflicting and/or inconsistent statutes or state court rulings. Because no federal issue or question exists in this matter and because Congress has not chosen to enter into this realm, neither should this Supreme Honorable Court.

Moreover, the Commonwealth Court of Pennsylvania's adoption of the reasoning and holding in *Pierce v. Casady*, 711 P.2d 766 (Kan. Ct. App. 1985), was prudent. In particular, the Commonwealth Court of Pennsylvania's approval of the following passage from *Pierce* makes sense, is entirely consistent with prior Pennsylvania caselaw, and should remain the law of Pennsylvania (and Kansas):

> The result reached here will be distasteful to all who treasure trees. The philosophy of the law is simply that whenever neighbors cannot agree, the law will protect each owner's rights insofar as that is possible. Any other result will cause landowners to seek self-help or to litigate each time a piece of vegetation starts to overhang their property for fear of losing the use or partial use of their property as the vegetation grows.

See Appendix, at Vol. 1, Commonwealth Court Opinion, pp. 31a-32a (*citing Pierce*, 711 P.2d at 768).

Finally, and as stated by the Commonwealth Court of Pennsylvania, the consequences of adopting the holding urged by the Koreskos are untenable. Trees grow over property boundaries and streets, around utility lines, and even under sidewalks throughout the Commonwealth of Pennsylvania and the other 49 states and the District of Columbia. "A decision suggesting that the prolonged presence of these tree parts assures their unreduced

continuation could cause uncertainty. Both the extent of the prescriptive easement and its effect on public and private use are problematic." *See* Appendix, at Vol. 1, Commonwealth Court Opinion, p. 32a.

b. Even assuming *arguendo* that Pennsylvania law recognizes easement rights for the roots of Pennsylvania trees, the Koreskos cannot establish any entitlement to that right because they cannot establish any easement by prescription and/or implication over the Property.

(1) The Koreskos cannot establish the requisite 21 year time period.

The Koreskos' alleged property rights claims based on an alleged prescriptive easement and/or an easement by implication over, or more exactly under, the Property also fail because the Koreskos cannot establish the requisite time period under Pennsylvania law. As stated above, a prescriptive easement is created by adverse, open, notorious, and uninterrupted use of land for twenty-one (21) years. *See Martin*, 666 A.2d at 640.

The Koreskos cannot establish the twenty-one (21) year time period necessary to establish under Pennsylvania law a property right based on a prescriptive easement. The Koreskos have not owned their property for twenty-one (21) years, but rather have only owned it since June 3, 1996, or for less than eight (8) years, which fails to meet the required requisite time period. Therefore, one crucial, critical and threshold element of the Koreskos' alleged property rights claim based on a prescriptive easement under Pennsylvania law was and is incapable of being established.

(2) The Koreskos cannot establish tacking.

The Koreskos also cannot establish "tacking" under Pennsylvania law in order to meet the requisite time period necessary to obtain a prescriptive easement.[15] There is nothing, direct and/or indirect, from which an inference can be drawn to indicate that the deed to the Koreskos for

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[15] Tacking is a concept of Pennsylvania law which permits a landowner to "tack" together the ownership of prior successors in title to establish the requisite twenty-one (21) year time period necessary for a claim of adverse possession or a prescriptive easement. In order for possession to be tacked, so as to establish the required twenty-one (21) year time period, there must be privity between the successive occupants of the property. *Watkins v. Watkins*, 775 A.2d 841, 846 (Pa. Super. 2001). In the petition for allowance of appeal to the Supreme Court of Pennsylvania filed by Bonnie Koresko, Mrs. Koresko cited to *Zeglin v. Gahagen*, 571 Pa. 321, 812 A.2d 558 (2002), apparently in an effort to argue that tacking was unnecessary. However, the holding in *Zeglin* is limited to the "setting" of that case and is distinguishable because it involved a *consentable boundary based on acquiescence*, and **not** *an easement by prescription or implication*. In *Zeglin*, two neighboring properties were separated by a row of "obvious[ly] presen[t]" bushes and a fence which was believed to mark the properties' boundary line. The Zeglins, the new owners, upon having the property surveyed, learned, among other things, that the bushes were not on the property line and removed them. In response, the Gahagens filed an action against the Zeglins for ejectment and trespass, claiming ownership up to the line previously demarcated by the bushes and the fence. In reversing the lower court's decree *nisi* in favor of the Zeglins, the Supreme Court of Pennsylvania held that due to the bushes' "obvious presence as [an] apparent boundary," that the purchaser [the Zeglins] is "put on notice to inquire about its origin, history, and function." *Id.* Then, if the structure has been in place for in excess of 21 years, the chips [and bushes] will be allowed "to fall where they may, for reasons of equity and peace." *Id.* at 566. Instantly, there are no allegations that the trees and/or other foliage on the Koreskos' Property formed any type of consentable or obvious boundary line with the Property. Further, the structures at issue here, the roots and root systems, are not obvious nor can their presence be known because they are underground, subterranean features not visible to the naked eye or a casual observer. This case is not, and never was, a consentable boundary case. Therefore, *Zeglin* is not on point, is distinguishable, and any reliance on it by the Koreskos was misplaced. Notably, the Koreskos do not mention *Zeglin* here.

their property included any tree roots or any inchoate and/or subterranean rights of any kind and specifically prescriptive easement rights. *See Croyle v. Dellape*, 832 A.2d 466 (Pa. Super. 2003).[16]

The deed to the Koreskos for their property does not reference, explicitly or implicitly, any easement(s) pertaining to roots or other subterranean features of and/or on the Koreskos' Property. The deed to the Koreskos for their property also does not reference, explicitly or implicitly, any easement(s) pertaining to roots or other subterranean features of and/or on the property of the Grupps and/or Kayes. Thus, tacking cannot be established by the Koreskos as a matter of Pennsylvania law. Tacking was therefore not proper in this matter and could not be used by the Koreskos in an attempt to establish the requisite time period needed under Pennsylvania law for a prescriptive easement (that is even if one could be established).

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[16] In *Croyle*, owners of lots in a subdivision filed an ejectment action against an owner neighbor for encroachment on a street easement in favor of all owners. The neighbor owner claimed title by adverse possession. The court held that when an adverse possession claimant of disputed land has not possessed the land for the required 21 year time period, the claimant must tack its predecessor's period of adverse possession for adverse possession to exist. In order for adverse possession to be tacked, there must be "privity" between the successive occupants of the property. Acceptance of a deed describing boundary lines confines the premises conveyed to the area within the boundaries, and such a deed does not convey incohate rights acquired by incomplete adverse possession. *But see Zeglin*, 812 A.2d at 566 (Privity of estate not required for tacking on claims brought under theory of acquiescence of boundary. Tacking permitted in such *limited* context upon sufficient and credible proof of delivery of possession of land not within (but contiguous to) property described in deed.).

(3) Tree roots, being subterranean structures, can in no way be open and notorious so as to be given rights under Pennsylvania law.

The pleadings in this matter are further devoid of any believable allegations or averments that (1) the Farley Respondents were aware of the existence of the roots on the Property and/or that the roots were open and/or notorious (so as to establish a claim for an easement by implication); and (2) the roots have been openly, notoriously, continuously, and uninterruptedly invading the Property for 21+ years (so as to establish a claim for a prescriptive easement). Any roots of any trees and/or other foliage owned by the Koreskos and/or which are located on the Koreskos' Property, and which entered onto, or more accurately under, the land and/or property of the Grupps [whose property and lot bordered the Koreskos' Property], and/or even the Kayes' property [which does not border the Koreskos' Property], were subterranean in nature. The roots were not visible to the naked eye, were incapable of being observed, and were not actually known or capable of imputing knowledge of the same. *See Fidelity-Philadelphia Trust Co., v. Wengert*, 67 Pa. D. & C. 351 (1947) (Plaintiff sought easement by implication. Court held cesspool and sewer pipe connection located on neighbor's property are all underground and the alleged easement is not apparent or visible. Therefore, the defendants did not have either actual or constructive notice of its existence at the time they acquired the property. The request for restraining order was denied.).

The roots were not, nor could they be, open or notorious so as to satisfy elements necessary for a prescriptive easement and/or an easement by implication. Roots by their nature are not open and/or notorious, but rather inclandestine. They do not lend themselves to establishing the elements of a prescriptive easement and/or an easement by implication. Thus, as a matter of law, they can never obtain such an easement. As pointed out by the Commonwealth Court of Pennsylvania, this conclusion is analogous to the Supreme Court of Pennsylvania's decision

that the known presence of windows near a lot line does not create a prescriptive easement for light and air. *See Maioriello v. Arlotta*, 364 Pa. 557, 73 A.2d 374 (1950) (such an easement cannot be created by prescription).

Because the Koreskos could not establish the elements of open and notorious, their claim(s) of a prescriptive easement and/or an easement by implication failed under Pennsylvania law. Further, given that no right(s) exist and/or can be established under Pennsylvania law, no "protected interest" exists, and the Koreskos cannot state a procedural due process claim.

2. The Code of Tredyffrin Township is not constitutionally defective because the Koreskos cannot establish any constitutionally or state protected property interest and because the procedures available to the Koreskos to challenge the alleged deprivation of their rights, through the mandatory appellate procedural mechanisms contained in the Pennsylvania Municipalities Planning Code, were adequate.

a. The Koreskos do not possess any right(s) which would have entitled them to notice of the subdivision approval.

The Koreskos' claim that the Code of Tredyffrin Township is constitutionally defective (and thus violative of due process) because it fails to provide to a property owner, whose property is located adjacent to a proposed minor subdivision (as that term is defined in the Code of Tredyffrin Township), with notice of a pending subdivision. Notably, in the *ad dannum* clause of the Koreskos' Amended Complaint, the Koreskos did not seek to strike down the MPC and/or the Code of Tredyffrin Township as unconstitutional. This "constitutionality" argument is the Koreskos' newest attempt to resuscitate a fatally flawed Amended Complaint and the "claims" and "causes of action" contained therein.

Regardless, and as detailed within, the Koreskos cannot establish any constitutionally or even state protected property interest taken from them by anyone, and in particular a state actor. Without any protected property interest, there is no due process requirement that the Koreskos be provided with notice and an opportunity to be heard. Although the Koreskos would like this Supreme Honorable Court to believe that the Koreskos possess real state-created easement rights for the trespassing roots of their trees, and that these rights outweigh the rights of a private property owner in developing his property, no support exists for this argument.

Under Pennsylvania law, an application for subdivision which conforms to all the technical requirements of relevant ordinances *cannot* be denied based on deed restrictions. *See Gulla v. North Strabane Township*, 676 A.2d 709 (Pa. Cmwlth. 1996), *aff'd*, 551 Pa. 588, 712 A.2d 281 (1998). Further, a township is not permitted to consider purported private rights of individuals before granting subdivision approval. *See Gossman v. Lower Chanceford Township Board of Supervisors*, 503 Pa. 392, 469 A.2d 996 (1983). Municipal bodies have no authority to refuse approval of a subdivision because of the effect which the subdivision could have upon a purported private easement. *See Fioretti v. Pastore*, 6 Erie L.J. 69 (1980).

As found by this Supreme Honorable Court, state power to regulate private property is *limited* to the adoption of reasonable restrictions that do not amount to a taking without just compensation or contravene any other federal constitutional provision. *Kaiser Aetna*, 444 U.S. at 179-180. The United States Constitution protects the right of individuals to exclude others from private property. *Id.* Further, not every destruction or injury to property by government action has been held to be a "taking" in the Constitutional sense. *Armstrong v. U.S.*, 364 U.S. 40, 48 (1960).

As detailed at length above, the Koreskos cannot establish any protected property interest under either federal or state law. In the absence of such a property interest, the Koreskos' "due process" claims and assertion

that the Code of Tredyffrin Township is constitutionally defective are without merit.

b. The appeal procedures of the MPC provide adequate due process protection to the Koreskos.

Notwithstanding, the Code of Tredyffrin Township and the MPC provided the Koreskos with adequate procedures to challenge the Koreskos' perceived injury to their alleged (albeit non-existent) easement rights.

On February 28, 2000, the Board of Supervisors for Tredyffrin Township, Chester County, Pennsylvania, approved Bower's plans to subdivide and develop the Property into two (2) residential lots.

Pursuant to Chapter 181, titled "Subdivision and Land Development" of the Code of Tredyffrin Township[17]

> [a]ppeals from the actions of the Board of Supervisors or the Planning Commission with respect to any application for subdivision or land development approval shall be governed by the applicable provisions of Act 247, the Pennsylvania Municipalities Planning Act [sic] as they may be amended, or any successor legislation thereto.

Code of Tredyffrin Township, at § 181-69.

Under the MPC, the proceedings set forth in the articles concerning appeals are the ***exclusive mode*** for securing review of any ordinance, decision, determination, or order of the governing body of a municipality, its agencies, or officers adopted or issued pursuant to this act. *See Dunlap v. Larkin*, 493 A.2d 750 (Pa. Super. 1985) (emphasis added); 53 P.S. § 10916.1(b).

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[17] The Farley Respondents, the Grupps, and the Kayes asked the learned trial court to take judicial notice of the relevant provisions of the Code of Tredyffrin Township, which it did. Certain relevant portions of the Code of Tredyffrin Township are contained in the Appendix at pp. 3a-22a.

Pursuant to Section 11002-A of the MPC, 53 P.S. § 11002-A,

> All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the Court of Common Pleas of the judicial district wherein the land is located and shall be filed within thirty (30) days after entry of the decision as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a deemed decision, within thirty (30) days after the date upon which notice of said deemed decision is given as set forth in Section 908(9) of [the MPC].

53 P.S. § 11002-A.

The procedure set forth in Article X-A shall constitute the exclusive mode for securing the review of any decision rendered pursuant to Article IX of the MPC. 53 P.S. § 11001-A.

In their Amended Complaint, the Koreskos asserted substantive challenges to the granting of the subdivision approval for the Property. The Koreskos contended that the Subdivision Plan for the Property was defective because it failed to "note or display the existence of the trees in question along the common boundary" between the properties; failed to completely list the existence of easements; failed to display the existence of trees on the boundary line; and did not list proposed material improvements. *See* Appendix, at Vol. 1, Amended Complaint, ¶¶ 63, 74, 75, and 76, pp. 183a-184a.

Article IV of the Code of Tredyffrin Township governs subdivision procedures. Pursuant to Section 181-9.A(2), a minor subdivision is defined as one where

> (a) No street is to be constructed or widened; (b) No other public improvement is to be constructed which is intended to be dedicated to the township, the state or to common use in a common development; (c) No land disturbance activities will take place except those incidental to construction of a single-family dwelling on each lot; and (d) No more than five lots are created.

See Appendix, at Vol. 1, Code of Tredyffrin Township, § 181-9.A(2), p. 6a. Where an application qualifies as a minor subdivision, the requirements and procedures of Sections 181-12 and 181-13 of the Code of Tredyffrin Township, regarding preliminary plans, shall be waived. *See* Appendix, at Vol. 1, Code of Tredyffrin Township, § 181-9.C(1), p. 6a.

The Koreskos' sole remedy for any claims that they may have had with respect to the Subdivision Plan for the Property should have been raised, and preserved, by the appeal procedures set forth in the Code of Tredyffrin Township and the MPC. *See* Code of Tredyffrin Township, at § 181-69, *supra,* and 53 P.S. §§ 11001-A, *et seq*. The Koreskos had thirty (30) days from the granting of the subdivision approval to file an appeal thereof under the MPC. The Koreskos did not file an appeal of the granting of the subdivision approval within that thirty (30) day period, or at any time thereafter.[18]

Further, the Subdivision Plan was approved on February 28, 2000, and recorded with the Chester County Recorder of Deeds on March 23, 2000. The Koreskos had constructive notice of the Subdivision Plan by virtue of its recording with the Chester County Recorder of Deeds and therefore cannot claim that they are not bound by the thirty (30) day appeal period limitation. Even assuming *arguendo* that the Koreskos possessed a property right in the form of an easement under Pennsylvania law, the Koreskos were afforded due process by virtue of the appeal procedures contained in the MPC. In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that were available to him, unless those procedures are unavailable or patently inadequate. *Bishop v.*

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[18] In the Koreskos' answer to the Farley Respondents' new matter, both of which the Koreskos have failed to include in the Appendix, the Koreskos did not, as required by Pa.R.C.P. No. 1029(b), specifically deny the factual averments that they did not appeal the granting of the subdivision approval within thirty (30) days. Therefore, pursuant to Pa.R.C.P. No. 1029(b), the Koreskos are deemed to have admitted the fact that they did not file an appeal of the granting of the subdivision approval for the Property within the required thirty (30) day time period.

Wood, 426 U.S. 341, 344 (1976). A due process violation is not complete when the deprivation occurs; it is not complete unless and until the state fails to provide for due process. *Id.*; *accord Zinermon*, 494 U.S. at 126. An individual is not denied procedural due process if a state provides the means by which he can receive redress for the deprivation. *Anselma Station, Ltd., v. Pennoni Associates, Inc.*, 654 A.2d 608 (Pa. Cmwlth. 1995) (*citing Parratt v. Taylor*, 451 U.S. 527 (1981)).

The Koreskos had available to them procedural means through which to contest the granting and approval of the Subdivision Plan. Instead of using those available procedural means, the Koreskos sat idly by. Mr. Koresko is a seasoned attorney, and he, even more than an average citizen, cannot claim ignorance of the mandatory procedures available to him. The Koreskos cannot now claim that they have been denied procedural due process.

The Koreskos had the right and the opportunity to redress their claims with Tredyffrin Township under the MPC. Because the Koreskos did not utilize the exclusive procedures of the MPC, any claims for a denial of procedural due process are without merit. Accordingly, the Koreskos' Petition for Writ should be denied.

CONCLUSION

For the foregoing reasons, the Farley Respondents respectfully request that this Supreme Honorable Court deny the Koreskos' Petition for a Writ of Certiorari.

Respectfuly submitted,

Date: December 16, 2004

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* Attorney Yaw's application to the bar of the United States Supreme Court is currently pending.